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4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF NEVADA**

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7 UNITED STATES OF AMERICA,
8 Plaintiff,
9 v.
10 DAVID ALAN COHEN,
11 Defendant.

Case No. 2:17-cr-00114-APG-CWH

REPORT AND RECOMMENDATION

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13 Presently before the court is pro se defendant David Alan Cohen's motion to dismiss
14 (ECF No. 235), filed on June 25, 2018.

15 Also before the court is the government's motion to strike (ECF No. 237) the motion to
16 dismiss, filed on June 28, 2018.

17 **I. BACKGROUND**

18 On September 23, 2016, a criminal complaint was issued, charging Defendant with
19 possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5) and receipt of child
20 pornography, in violation of 18 U.S.C. §§ 2252A(a)(2) and (b). (Compl. (ECF No. 1).) On April
21 12, 2017, a federal grand jury indicted defendant, alleging that beginning on a date unknown and
22 continuing to on or about September 21, 2016, he knowingly possessed child pornography and
23 any material that contains child pornography, in violation of 18 U.S.C. § 2256(8), and received
24 and distributed child pornography and any material that contains child pornography, as defined in
25 18 U.S.C. § 2256(8), all in violation of 18 U.S.C. §§ 2252A(a)(5) and 2252A(a)(2) and (b).
26 (Indictment (ECF No. 37).) On June 13, 2018, a federal grand jury issued a superseding
27 indictment including the same allegations, as well as an additional allegation that defendant was
28 previously convicted under the laws of the State of New York with aggravated sexual abuse,

1 sexual abuse, and abusive sexual conduct involving a minor, to wit: sodomy in the second degree.
2 (Superseding Indictment (ECF No. 228).) The pretrial motions deadline in this case expired on
3 May 14, 2017. (Order Regarding Pretrial Procedure (ECF No. 42).) Defendant now moves to the
4 dismiss the complaint.

5 **II. DISCUSSION**

6 As the court understands defendant's motion, which is difficult to follow and cites
7 numerous inapplicable principles of civil law, defendant moves to dismiss the complaint because
8 it is defective and violates his due process rights. Specifically, he argues the complaint fails to
9 state a claim and that there were procedural defects and forgery related to the signing of the
10 complaint and arrest warrant in this case. It appears defendant also may be requesting leave to
11 supplement previous briefing or for reconsideration, though he does not provide record cites for
12 particular documents he seeks to supplement. Rather than responding to the motion, the
13 government moves to strike the motion on the grounds that it is untimely. The government also
14 argues that Cohen was indicted subsequent to the complaint. Alternatively, the government
15 requests an opportunity to oppose the motion with instructions from the court on which issues the
16 government should respond.

17 Defendant filed a previous motion to dismiss that raised the same issues as the current
18 motion to dismiss. The court addressed defendant's arguments regarding the complaint at length
19 and entered a report and recommendation that defendant's motion to dismiss the complaint be
20 denied. (Report & Recommendation (ECF No. 126).) The United States district judge assigned
21 to this case adopted that report and recommendation in full. (Order (ECF No. 195).) The pretrial
22 motions deadline in this case expired over a year ago, and defendant does not articulate good
23 cause for the late filing of this motion under Rule 12(c)(3) of the Federal Rules of Criminal
24 Procedure. The court therefore will recommend that the motion to dismiss be denied as untimely.

25 To the extent defendant moves for reconsideration of the court's previous decisions on his
26 motion to dismiss, the court also will recommend that the motion be denied. While the Federal
27 Rules of Criminal Procedure do not contain a provision specifically allowing motions for
28 reconsideration, numerous circuit courts have held that motions for reconsideration may be

1 filed in criminal cases. *See United States v. Martin*, 226 F.3d 1042, 1047 n.7 (9th Cir. 2000)
 2 (post-judgment motion for reconsideration may be filed in a criminal case and governed by Fed.
 3 R. Civ. P. 59(e)); *United States v. Fiorelli*, 337 F.3d 282, 286 (3d Cir. 2003) (motion for
 4 reconsideration allowed in criminal case and governed by Fed. R. Civ. P. 59(e) or Fed. R. Civ. P.
 5 60(b)); *United States v. Clark*, 984 F.2d 31, 33-34 (2d Cir. 1993) (motion for reconsideration filed
 6 in criminal case within 10 days of subject order is treated under Fed. R. Civ. P. 59(e)). Motions
 7 for reconsideration in criminal cases are governed by the rules that govern equivalent motions in
 8 civil proceedings. *See United States v. Hector*, 368 F. Supp. 2d 1060, 1062-63 (C.D. Cal. 2005)
 9 *rev'd on other grounds*, 474 F.3d 1150 (9th Cir. 2007).

10 Reconsideration is appropriate if the court: (1) is presented with newly discovered
 11 evidence; (2) committed clear error, or the initial decision was manifestly unjust; or (3) if there is
 12 an intervening change in controlling law. *Dixon v. Wallowa County*, 336 F.3d 1013, 1022 (9th
 13 Cir. 2003). Reconsideration is “an extraordinary remedy, to be used sparingly and in the interests
 14 of finality and conservation of judicial resources.” *Kona Enters., Inc. v. Estate of Bishop*, 229
 15 F.3d 877, 890 (9th Cir. 2000) (quotation omitted).

16 Here, defendant does not demonstrate that the court committed clear error, that the initial
 17 decision was manifestly unjust, or that there has been any intervening change in controlling law.
 18 Instead, defendant repeats many of the same arguments that the court previously addressed at
 19 length. Thus, to the extent defendant moves for reconsideration of the court’s previous orders on
 20 his motion to dismiss the complaint, the court will recommend that the motion be denied. Given
 21 that the court will recommend that the motion to dismiss be denied, the court also will
 22 recommend that the government’s motion to strike be denied as moot.

23 **III. CONCLUSION**

24 IT IS THEREFORE RECOMMENDED that defendant David Alan Cohen’s motion to
 25 dismiss (ECF No. 235) be DENIED.

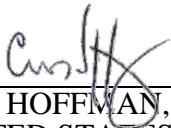
26 IT IS FURTHER RECOMMENDED that the government’s motion to strike (ECF No.
 27 237) the motion to dismiss be DENIED as moot.

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NOTICE

This report and recommendation is submitted to the United States district judge assigned to this case under 28 U.S.C. § 636(b)(1). A party who objects to this report and recommendation may file a written objection supported by points and authorities within fourteen days of being served with this report and recommendation. Local Rule IB 3-2(a). Failure to file a timely objection may waive the right to appeal the district court's order. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991).

DATED: July 18, 2018



C.W. HOFFMAN, JR.
UNITED STATES MAGISTRATE JUDGE